

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No. 8:03-CR-77-T-30TBM

HATEM NAJI FARIZ

_____ /

**SUPPLEMENTAL MOTION OF HATEM NAJI FARIZ TO TRANSFER VENUE
AND MEMORANDUM OF LAW IN SUPPORT**

Defendant, Hatem Naji Fariz, by and through undersigned counsel, and pursuant to the Fifth Amendment's Due Process Clause, the Sixth Amendment, and Federal Rule of Criminal Procedure 21(a), hereby supplements his previous request that this Honorable Court transfer venue in this case from the Tampa Division of the Middle District of Florida to a venue outside the State of Florida.

On May 2, 2005, Mr. Fariz filed his motion to transfer venue on the basis that prejudicial pretrial publicity through the traditional media and through the 2004 Senate campaign has so saturated the Tampa Division that any jury seated could be presumed to be prejudiced against the defendants. The motion was supported by the declaration of a nationally known expert who has taken positions both in favor of and against venue changes in many high profile cases across the nation, including terrorism cases. The motion was further supported by a comprehensive, scientific survey of registered voters in the Tampa Division that demonstrated that 95% of people in this jurisdiction know of Dr. Sami Al-Arian and his case. Comparative surveys demonstrated lower rates of recognition in Miami

and Tallahassee and a much lower rate of recognition in Atlanta.¹ Mr. Fariz contends that he has met his burden of demonstrating the presumed prejudice against him due to his co-defendant, Sami Al-Arian, in his motion to transfer venue. He demonstrated that the pretrial publicity was so prejudicial, and so saturated the community, that any panel of 12 jurors would naturally be prejudiced against the defense.

On May 16 - 18, 2005, the court conducted voir dire for a panel of approximately 150 of the 322 potential jurors who returned questionnaires. Ultimately, 89 potential jurors were selected as eligible to serve on the jury in this case. On May 19, 2005, the court heard peremptory strikes, and a 12 member jury was selected with 10 potential alternates.² After reviewing the answers given by the selected panel of jurors and alternate jurors in their questionnaires and during voir dire, and consulting with his experts, Mr. Fariz cannot, at this time, present a good faith argument to the court that venue should be changed due to the *actual* prejudice of the jury. As explained more fully below, under the circumstances of this case, even the most conscientious voir dire procedures are not adequate to expose latent prejudices and biases. Therefore, Mr. Fariz continues to contend that this jury is presumed to be prejudiced, and that one or more of the jurors who will decide Mr. Fariz' fate in this

¹The court subsequently requested that a survey be conducted in the Jacksonville Division of the Middle District of Florida. That survey is complete and is attached as Exhibit 1.

²The court is currently contemplating whether the Federal Rules of Criminal Procedure allow for seating more than six alternate jurors.

case have biases and prejudices against him and/or his co-defendants that were not revealed during voir dire, thereby depriving him of his constitutional right to trial by an impartial jury.

The Supreme Court states exactly Mr. Fariz' concern: "No doubt each juror was sincere when he said that he would be fair and impartial [], but psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). Mr. Fariz contends that voir dire procedures would not be adequate to overcome the presumption of prejudice demonstrated in his May 2, 2005, motion.

As Professor Edward Bronson, Ph.D. opined, voir dire procedures are not necessarily adequate to uncover the prejudices and biases that potential jurors may harbor. For example, Professor Bronson states that the environment of jury selection shapes and influences peoples' attitudes and behaviors. See Affidavit ¶ 131 at 31.³ He says, "[a] special problem is that questioning takes place in the courtroom, where the basic notions of justice and good citizenship are the prevailing ethos. . . It is not easy to tell the judge sitting up on the bench in black robes that one cannot do one's duty, cannot be fair and impartial, cannot follow the instructions of the court, and cannot be a good citizen." Affidavit ¶ 132 at 31. See also Affidavit ¶¶ 133 - 134 at 31 - 32. Professor Bronson states that these problems, inherent in any voir dire procedure, are "particularly intractable with pretrial publicity." Affidavit ¶ 135

³Professor Bronson's Affidavit was attached to Mr. Fariz' Motion to Transfer Venue, Docket No. 994 at Exhibit 1.

at 32. In his breadth of experience, he has reviewed many voir dire transcripts and finds that it is rare to see many prospective jurors admit that they cannot be fair and impartial, “even in a lynch-type atmosphere.” Affidavit ¶ 138 at 33.

Professor Bronson’s analysis is consistent with the Supreme Court’s recognition that when prejudicial pretrial publicity has caused significant numbers of potential jurors to express disqualifying prejudice, “the reliability of the others’ protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by [pretrial publicity].” *Murphy v. Florida*, 421 U.S. 794, 802 (1975). The government itself states that “Over 200 prospective jurors [out of 322] have been excused, many because some kind of publicity had caused the juror to prejudge the case.” Doc. 1094 at 2. A significant majority of these jurors were stricken due to prejudices and biases against the defendants that were so strong that they themselves recognized their own inability to set those feelings aside and be fair and impartial.⁴ Mr. Fariz contends that those who remain are also presumed to have prejudices and biases against the defendants in this case, depriving Mr. Fariz of his constitutional right to trial by an impartial jury.

⁴ Even many of those who were excused for hardship also expressed prejudice.

For the foregoing reasons, Mr. Fariz respectfully renews his request that this Honorable Court transfer this case from the Tampa Division of the Middle District of Florida to a venue outside the State of Florida.

Respectfully submitted,

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FEDERAL PUBLIC DEFENDER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of May, 2005, a true and correct copy of the foregoing has been furnished by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Cherie L. Krigsman, Trial Attorney, U.S. Department of Justice; Alexis L. Collins, Assistant United States Attorney; William Moffitt and Linda Moreno, counsel for Sami Amin Al-Arian; Bruce Howie, counsel for Ghassan Ballut; and to Stephen N. Bernstein, counsel for Sameeh Hammoudeh.

/s/ Kevin T. Beck
Kevin T. Beck
Assistant Federal Public Defender